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CURRENT TOPICS.

In a recent case in New York, *Casey v. New York Central R. Co.*, 15 Daily Reg. 301, the law of contributory negligence in that State, as applicable to children, was reviewed, and the gradual change within the past fifteen years, from the strict rule once enunciated by the Court of Appeals, that a child should be held to the exercise of the same care and prudence as an adult, was pointed out. The case of Hanesberger v. Second Avenue R. Co., 2 Abb. (Ct App.) 378, seemed at one time to have established that doctrine. In that case the court said that in applying the rule that exacts the decree of care which a person of ordinary prudence would exercise in the situation supposed, the law makes no discrimination on account of age; that it applies to all persons without exception. But an examination of the more recent cases in that court presents a different and more correct rule, and one now well settled. Thus, in O'Mara v. Hudson R. R. Co., 38 N. Y. 447, where the question was one of contributory negligence, Hunt, C. J., in delivering the opinion of the court, says: "The old, the lame and the infirm are entitled to the use of the streets, and more care must be exercised towards them by engineers than towards those who have better powers of motion. The young are entitled to the same rights, and cannot be expected to exercise as great foresight and vigilance as those of maturer years." In Morey v. Central City R. Co., 51 N. Y. 667, Johnson, J., said that the young are entitled to have their condition and ability considered in diminution of the degree of care exacted of them; that no greater degree of care was required than the capacity of the person would allow him to exert. In Reynolds v. New York Central R. Co. 58 N. Y. 252, Andrews, J., in delivering the opinion of the court, says that "the law discriminates between children and adults, the feeble and the strong, and only requires of each that degree of care to be reasonably expected in view of his age and condition," and the same judge in delivering the opinion of the court in McGorm v. New York Central R. Co., 67 N. Y. 421. upon the question of contributory negligence says that it is not to be applied inflexibly in all cases without regard to age or circumstances. "The law is not so unreasonable as to expect or require the same maturity of judgment or the same degree of care or circumspection in a child of tender years as in an adult."

THE brevity in general of the opinions of Mr. Chief Justice Waite, which we have several times called attention to, still continues to be noticeable. In *Hunt v. Hunt*, decided at this term of the Supreme Court of the United States, (the plaintiff and defendant in error being the lately appointed judge of the Court of Claims), the opinion of the Chief Justice as to the two questions raised was as follows: "In the Dartmouth College case, 4 Wheat. 629, it was expressly said by Chief Justice Marshall, in delivering the opinion of the court, that the provision of the Constitution prohibiting States from passing laws impairing the obligation of contracts 'had never been understood to embrace other contracts than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the legislature to legislate upon the subject of divorces. Those acts enable some tribunal, not to impair the marriage contract, but to liberate one of the parties because it has been broken by the other.' This disposes of the first ground upon which our jurisdiction is invoked in this case. The law complained of simply provides for divorces in certain cases, after hearing by a court of competent jurisdiction. The suit in Louisiana was one affecting the personal status of the defendant in error, a citizen of that State. The contract of marriage from which he sought to be liberated had been entered into in that State, when both parties were citizens of the State. The question presented for decision below and decided, was not what would be the rights of the plaintiff in error if she had been a citizen of the State of New York when the suit was commenced against her in Louisiana, but whether she was a citizen of New York. Such a decision of the State court does not present a

question of which we have jurisdiction. The motion to dismiss is granted."

By the enactment by Congress, of the Revised Statutes of the United States, a new body of laws, as by original legislation, was not made; therefore, they do not make any thing law which was not law on the first day of December, 1873. This ruling was recently made in the United States Circuit Court for the District of Alabama, in the case of *United States v. Moore*, 7 Rep. 179. A plea in abatement had been filed to an indictment found in the District Court, on the ground that one of the persons composing the grand jury which found the bill was disqualified to act because of having taken up arms against the United States, and the question was therefore presented whether section 820 of the Revised Statutes is now in force. BRUCE, J., said. "It is admitted that the section was not the law on the first day of December, 1873, and it appears that it was section one of an act approved June 17, 1862, and was repealed by section five of an act approved April 2, 1871. It is claimed that it was re-enacted by the adoption of the Revised Statutes of the United States. Section 5595, of the Revised Statutes, provides: "The foregoing seventy-three titles embrace the statutes of the United States, general and permanent in their nature, in force on the first day of December, 1873, as revised and consolidated by commissioners appointed under an act of Congress, and the same shall be designated and cited as the Revised Statutes of the United States." It certainly can not be maintained that this language enacts or re-enacts any thing as law which was not the law on the first day of December, 1873. The seventy-three titles were supposed to embrace the laws of the United States, general and permanent in their nature, but if they contained any thing which was not law on the first day of December, 1873, its introduction into the Revised Statutes, be it by mistake or otherwise, can not and does not make it the law. The test of the matter is, was it the law on the first day of December, 1873? If not, this language does not re-enact it. The statutes was not the enactment of a body of laws as original legislation, but it was the enactment of a more convenient expression of the law as it existed on the first day of December, 1873. To determine how and in what mode the law shall be designated and cited, is a very different thing from enacting laws, and the language shows that it was not the latter, but the former which Congress did when it adopted the Revised Statutes. The conclusion is that section 820, of the Revised Statutes, not being the law on the first day of December, 1873, was not re-enacted by being carried into the Revised Statutes, and that the juror was not disqualified."

PAID-UP SHARES.

Some of the judges of the Federal Courts, in passing upon questions relating to the liability of shareholders in corporations, have lately fallen into the habit of quoting extensively the recent English decisions. Foreman v. Bigelow, 7 Cent. L. J. 430; Phelan v. Hazard, 6 Cent. L. J. 109; Johnson v. Laflin, 6 Cent. L. J. 124. Unless care is taken to keep in mind the distinctive grounds on which the English and the American courts proceed in charging shareholders of insolvent companies, the practice of relying upon English decisions will mislead the American judge into a conspicuous departure from the doctrine established by the courts of this country, and this departure will not be in the direction of honesty and fair dealing.

In 1824, the fertile brain of Mr. Justice Story invented the doctrine that the capital stock of a corporation is a trust fund or pledge for the payment of its creditors. Wood v. Dummer, 3 Mason, 308. This doctrine, founded in the largest equity, has been sanctioned by decisions of the Supreme Court of the United States, and of the highest courts of the several States wherever the question has arisen. It has never been disputed by an American court, and has become a principle of American jurisprudence, as well settled as any principle can be. Story's Eq. Jur., § 1252; Wood v. Dummer, 3 Mason, 308; Vose v. Grant, 15 Mass. 505; Spear v. Grant, 16 Mass. 15, 19; Baker v. Atlas Bank, 9 Metc. 192; Mumma v. Potomac Co., 8 Pet. 286; Curran v. Arkansas, 15 How. 304; Tarbell v. Page, 24 Ill. 46; Ogilvie v. Knox Ins. Co., 22 How. 387; Payson v. Stoever, 2 Dill. 431; Sawyer v. Hoag, 17 Wall. 610; Burke v

Smith, 16 Wall. 390; New Albany v. Burke, 11 Wall. 96; Hightower v. Thornton, 8 Ga. 486; Robinson v. Carey, 8 Ga. 530; Reid v. Eatonton Co,, 4 Ga. 102; Slee v. Bloom, 19 Johns. 456; Briggs v. Penniman, 8 Cow. 395; Mann v. Pentz, 3 N Y. 422; Hurd v. Tallman, 60 Barb. 272; Bank of St. Marys v. Powers, 25 Ala. 612; Carey v. Woodward, 53 Ala. 375; Smith v. Huckabee, 53 Ala. 195; Paschall v. Whitsett, 11 Ala. 472; Allen v. Montgomery R. Co., 11 Ala. 437; Bassett v. St. Albans Hotel Co., 47 Vt. 313; Adler v. Milwaukee Patent Brick Co., 13 Wis. 57; Miers v. Zanesville Co., 11 Ohio, 274; s. c., 13 Ohio, 197; Henry v. Vermillion Co., 17 Ohio, 187; Moss v. Burroughs, 1 Woods, 467; Payne v. Bullard, 23 Miss. 90; Tinkham v. Borst, 31 Barb. 407. The capital stock of a corporation, which is subject to the operation of this rule, consists of all the stock which the members have subscribed. Adler v. Milwaukee Patent Brick Co., 13 Wis. 57; Hightower v. Thornton, 8 Ga. 486; Briggs v. Penniman, 8 Cow. 387; Allen v. Montgomery, R. Co., 11 Ala. 437; Slee v. Bloom, 19 Johns. 456; Wood v. Dummer, 3 Mason, 308; Mann v. Pentz, 3 N. Y. 422; Payne v. Bullard, 23 Miss. 90. This is deemed to consist of three funds: 1. Money which has been subscribed and paid in. 2. Money thus subscribed but not paid in. Slee v. Bloom, 19 Johns. 459; Briggs v. Penniman, 8 Cow. 386; Ward v. Griswoldville Man'fg. Co., 16 Conn. 597; Mann v. Pentz, 3 N. Y. 422; Allen v. Montgomery R. Co., 11 Ala. 437; Spear v. Grant, 16 Mass. 9; Hightower v. Thornton, 8 Ga. 486; Bassett v. St. Albans Hotel Co., 47 Vt. 314; Henry v. Vermillion, etc. R. Co., 17 Ohio 187; Payne v. Bullard, 23 Miss. 90; Sanger v. Upton, 91 U. S. 60. 3. Money thus subscribed, but afterwards improperly divided among the members, leaving the debts of the corporation unpaid. Wood v. Dummer, 3 Mason 308; Curran v. Arkansas, 15 How. 304; Reid v. Eatonton Man. Co., 40 Ga. 98, 104; Lewis v. Robertson, 13 Smed. & M. 558. Stated in another way, the capital stock of a corporation, in the eye of an American court of equity, is the stake or pledge upon which the company obtains credit. If any member has not paid his share of it into the common treasury, he is deemed to hold so much of a fund in his pocket, upon which the creditors of the concern have an equitable charge or lien, and a court of equity will lay hold of him and compel him to surrender up this fund for the benefit of such creditors. Adler v. Milwaukee Patent Brick Co., 13 Wis. 60.

In the view of the American courts, whoever subscribes to an unconditional agreement to take shares becomes liable to pay for them, subject to the conditions named in the subscription paper, and to those imposed by the charter or by the general law. Hartford and New Haven R. Co. v. Kennedy, 12 Conn. 499; Sagary v. Dubois, 3 Sands. Ch. 466; Union Turnpike Co. v. Jenkins, 1 Caines, 380; Goshen Turnpike Co. v. Hurtin, 9 Johns. 217; Duchess Cotton Man. Co. v Davis, 14 Johns. 237; Spear v. Crawford, 14 Wend. 20; Highland Turnpike Co. v. McKean, 11 Johns. 98; Strong v. Wheaton, 38 Barb. 616; Burr. v. Wilcox, 22 N. Y. 557; Pickering v. Templeton, 2 Mo. App. 424; Beene v. Cahawba, etc. R. Co., 3 Ala. 660; Upton v. Tribilcock; 91 U. S. 47; Brigham v. Mead, 10 Allen, 245; Buffalo, etc. R Co. v. Dudley, 14 N. Y. 336; Seymour v. Sturgess, 26 N. Y. 134; Dayton v. Borst, 31 N. Y. 435; Rensellaer, etc. Co. v. Barton, 16 N. Y. 457; Lake Ontario, etc. Co. v. Mason, 16 N. Y. 451; Hartford, etc. R. Co. v. Croswell, 5 Hill 383; Northern R. Co. v. Miller, 10 Barb. 260; Kennebeck, etc. R. Co. v. Palmer, 34 Me 366; Connecticut, etc. R. Co. v. Bailey, 24 Vt. 465; Foy v. Lexington R, Co. 2 Metc. (Ky.) 314; Klein v. Alton, etc. R. Co., 13 Ill. 514; Barret v. Alton, etc. R. Co., 13 Ill. 504. Carrying out the doctrine first stated, if the corporation becomes insolvent and its social assets exhausted before a member has paid for his shares, a court of equity will interpose and compel him to make such payment for the benefit of creditors. Unless he has paid, he must pay; and an American court will entertain a bill for discovery to compel the corporation or its members to disclose whether they have paid or not, (Miers v. Zanesville Co., 11 Ohio 273; Middletown Bank v. Russ, 3 Conn. 135; Bogardus v. Rosendale Man. Co., 7 N. Y. 147), and will put aside and discharge all sham devices and secret agreements not to pay, or not to pay in full, or to pay in something other than money or money's worth. Mann v. Cooke. 20 Conn. 179, 187; Robinson v. Pittsburg, etc. R. Co., 32 Pa. St. 334; Graff v. Pittsburg,

etc. R. Co., 31 Pa. St. 489; New Albany, etc. R. Co. v. Fields, 10 Ind. 187; New Albany, etc. R. Co. v. Slaughter, 10 Ind. 218; Downie v. White, 12 Wis. 176; Blodgett v. Morrill, 20 Vt. 509; Nathan v. Whitlock, 9 Paige, 152; Noble v. Callender, 20 Ohio St. 199; Henry v. Vermillion, etc. R. Co., 17 Ohio 187; Haviland v. Chace, 39 Barb. 283.

In the recent English books there is no distinct trace of such a doctrine as that the capital stock of a corporation is a trust fund for its creditors. But on the other hand the primary object of the English winding-up act of 1848 was declared by Sir John Romilly, himself the author of that act, not to satisfy creditors, but to produce equality among shareholders. *Re* Phillips, 18 Beavan, 629. This seems to have been universally conceded in subsequent cases; and even under the Companies Act of 1862, which was framed with the view of winding up companies for the benefit of creditors as well as for that of shareholders, it is obvious from expressions of the judges in winding-up proceedings that the social rights of shareholders are looked to rather than the rights of creditors. Spackman v. Evans, L. R. 3 H. L. 171.

The American courts, however, so carefully regard the rights of creditors as to hold persons to the liability of stockholders, in consequence of their *conduct* in holding themselves out, or in suffering themselves to be held out to the public as such. Matter of Reciprocity Bank, 22 N. Y. 17, *per* Comstock, C. J.; McHose v. Wheeler, 45 Pa. St. 32; Pittsburg, etc., R. Co. v. Stewart, 41 Pa. St. 54; Haywood, etc., Co. v. Bryan, 6 Jones L. 82; Greenville, etc., R. Co. v. Coleman, 5 Rich. L. 118; Graff v Pittsburg, etc., R. Co., 31 Pa. St. 489; Hays v. Pittsburg, etc., R. Co., 38 Pa. St. 81; Dayton, etc., R. Co. v. Hatch, 1 Disney, 84; Chace v. Merrimack Bank, 19 Pick. 564; Hager v. Cleveland, 36 Md. 476; Chaffin v. Cummings, 37 Me. 76; Rutland, etc., R. Co. v. Lincoln, 29 Vt. 208; McCully v. Pittsburg, etc., R. Co., 32 Pa. St 25; Philadelphia, etc., R. Co. v. Cowell, 28 Pa. St. 329; Mississippi, etc., R. Co. v. Harris, 36 Miss. 17; Frost v. Walker, 60 Me. 468; Hall v. United States Ins. Co. 5 Gill, 484; Mississippi, etc., R. Co. v. Harris, 36 Miss. 17. But, although some of the English and Irish justices have held to this view. (Lord St. Leonards, in Spackman v. Evans, L. R. 3 H. L. 197, Lord Denman, C. J., in Cheltenham, etc., R. Co. v. Daniel, 2 Q. B. 281; Taylor v. Hughes, 2 Jones & Lat. (Irish Ch.) 24; Bargate v. Shortridge, 5 H. L. Cas. 297; Henderson v. Royal British Bank, 7 El. & Bl. 356; Oakes v. Turquand, L. R. 2 H. L. 325), yet the House of Lords and the English Lords Justices of Appeal have lately settled down upon the doctrine that the rights of the creditor against shareholders exist only *in the right of the company;* that they can in general only claim to be paid out of the assets of the company, which assets are limited to what the company had a right to bring into the assets, (Smith's Case, L. R. 2 Ch. 604; Directors v. Kisch, L. R. 2 H. L. 99; Waterhouse v. Jamieson, L. R. 2 H. L. Sc. 29; Carling's Case, 1 Ch. Div. 115); and that the official liquidator, who corresponds to a receiver or assignee in this country, can enforce the rights of the creditors against shareholders only in the right of the company. Waterhouse v. Jamieson, L. R. 2 H. L. Sc. 29; *ex parte* Currie, 32 L. J. (Ch); s. c., 3 De G. J. & S. 367; 7 L. T. (N. S) 486; Carling's Case, 1 Ch. Div, 115; Burkinshaw v. Nicholls, 26 W. R. 821, House of Lords, 1878. If, then, the shareholders, in organizing a company, have made such a contract touching the payment or non-payment of shares as would estop the company, while a going concern, from maintaining a suit for calls against a shareholder, the official liquidator in a winding-up proceeding after insolvency will be equally estopped from putting the shareholder on the list of contributories. Carling's Case, 1 Ch. Div. 115. This doctrine certainly sounds well in the abstract, but the interest centers in the application of it. A lot of rogues can put their heads together and agree to organize a company, and agree that the shares shall be deemed and treated as paid up, although nothing, in fact, is to be paid, and that the company is to be registered in the public registry of joint stock companies as a company whose shares have been fully paid. This, in the opinion of the English equity judges, makes the shares paid, so that when the bubble bursts the official liquidator is powerless to compel payment to the creditors. Carling's Case, *supra*. The reasoning upon which those judges proceed is this: Such a contract can not be

modeled: it is either valid *in toto*, or void *in toto*. If it is valid, the shareholders can not be put upon the list of contributories, because their shares are paid up; if it is void, they can not be put upon the list of contributories, because they have not agreed to take any shares except paid-up shares. *Ex parte* Curry, 32 L. J. (Ch.) 57: s. c. 3 De G. J. & S. 367; 7 L. T. (N. S.) 486; Burkinshaw v. Nicholls, 26 W. R. 821, H. of L. 1878.

It is obvious that, in such a case, an American court would treat the shareholders as fraudulently withholding from the assets of the company its capital stock, and would compel them to disgorge this trust fund for the benefit of creditors; in other words, it would compel them to make good the registered lie which they had published to the world, by paying for shares for which they had never paid. But, in the view of the English courts, the creditor's remedy melts into thin air. It is, indeed, a breach of trust for the directors to issue paid-up shares, which have not, in fact, been paid, and the person receiving them with the knowledge that they have not been paid up, is a participator in the wrong. But they say that he can not be capriciously punished by being compelled to do what he has not agreed to do, and that he has falsely declared that he has done--pay for shares on which he has paid nothing. It seems that the company, or its representative, can proceed against him and recover the shares, *or whatever damage the company has sustained through the perpetration of the wrong*. The effect of such an act, in this view, is not to make the sharetaker liable *ex contractu* for the nominal value of the shares, but to make him liable *ex delicto* for their real value. Carling's Case, 1 Ch. Div. 115. This abominable doctrine has lately been adopted by the Supreme Court of Canada, some of the judges dissenting, (McCracken v. McIntyre, 1 Duval (Canada) 479), and a respectable court nearer to us held, presumably out of deference to the English cases, which were cited to it, that *bonus* shares, issued as having been paid up to the extent of 60 cents on the dollar, no payment, in fact, having been made, are, in an action by creditors, against the holders of them, to be deemed to have been paid up to that extent. Skrainka v. The Stockholders, MS., U S. Circuit Court, Eastern District of Mo., 1878. Opinion by Treat, District Judge. No reason was given for this conclusion. The same question, relating to the same shares, was before the Circuit Court of St. Louis, and Thayer, J., in a well reasoned opinion, held, upon the authority of Sawyer v. Hoag, 17 Wall. 610, that the shareholders were to be chargeable as though nothing of this 60 per centum had been paid.

PUBLIC ADMINISTRATION — CONSTRUCTION OF MISSOURI STATUTE.

UNION MUTUAL LIFE INS CO. v. LEWIS.

Supreme Court of the United States, October Term, 1878.

The Missouri statute, as to public administration, (1 W. S. 122), construed and *held* not to authorize a suit by a public administrator in Missouri against a foreign corporation doing business there, upon a contract not made or to be executed in that State, with a citizen of another State, who neither resided, nor died, nor left any estate in Missouri.

In error to the Circuit Court of the United States for the Eastern District of Missouri.

E. W. Pattison for plaintiff in error; *W. S. Bodley* for defendant in error.

Mr. JUSTICE HARLAN delivered the opinion of the court:

This action was commenced in the Circuit Court of St. Louis county. Mo., by the defendant in error as public administrator of that county, upon a policy of insurance dated July 30, 1873, whereby the Union Mutual Life Insurance Company of Maine, plaintiff in error, agreed to insure the life of William S. Berton, "of Milwaukee.county of Milwaukee, State of Wisconsin," in the sum of $5,000, payable three months after due proof of death, to his executors, administrators, or assigns. The case was removed for trial into the Circuit Court of the United States for the Eastern District of Missouri, where a verdict and judgment were rendered against the company. A new trial and motion in arrest of judgment having both been denied, the present writ of error is prosecuted by the company.

A preliminary question is presented as to the right of the defendant in error, as public administrator of St. Louis county, Missouri, to maintain any action whatever upon the policy sued on. His authority in the premises is claimed to exist under a Missouri statute of 1868, which was in force when this action was instituted. That statute makes it "the duty of the public administrator to take into his charge and custody the estates of all deceased persons in his county, in the following instances: *First*, when a stranger dies intestate in the county, without relatives, or dies leaving a will, and the executor named is absent, or fails to qualify; *Second*, when persons die intestate, without any known heirs; *Third*, when persons unknown die, or are found dead, in the county; *Fourth*, when money, property, papers, or other estate are left in a situation exposed to loss or damage, and no other person administers on the same; *Fifth*, when

any estate of any person who dies intestate therein or elsewhere, is left in the county liable to be injured, wasted, or lost, when said intestate does not leave a known husband, widow, or heir in this State; *Sixth*, when from any good cause, said court shall order him to take possession of any estate to prevent its being injured, wasted, purloined or lost." 1 Wagner's Stat., ed. 1872, p 122. The same statute requires the public administrator, immediately upon taking charge of any estate, for the purpose of administering the same (except that of which he shall take charge under the order of the proper court), to file a notice of such fact in the clerk's office of the court having probate jurisdiction. *Ibid*, p. 123.

On 17th September, 1875, the defendant in error, as public administrator, filed in the clerk's office of the Probate Court of St. Louis county, a notice, addressed to the judge of that court, informing creditors and all other persons interested in the estate of Wm. S. Berton, "late of the county of St. Louis," that he had, on that day, taken charge of such estate for the purpose of administering the same; and, immediately thereafter, on the same day, commenced this action in the circuit court of that county, without making and presenting proofs of loss, or giving the company previous notice of his administration, or that he, as such administrator, asserted any claim under the policy. These steps were taken, as was conceded on the trial below, "for the sole purpose of administering upon and collecting the policy in suit." It also appears that Berton, at the date of the policy, and at his death, which occurred on 31st March, 1874, was a resident of Milwaukee and a citizen of Wisconsin; that he died in that city, and had not at any time resided in the State of Missouri; that he left no money, property, papers, or other estate in Missouri; that the policy sued on was found among his papers after his death; that on the 5th June, 1874, administration upon his estate was granted by the county court of Milwaukee county, Wisconsin, to Benj. K. Miller; that the defendant in error was never ordered by the Probate Court of St. Louis county, or any other court, to take charge of Berton's estate.

The bare statement of these facts, which are admitted or are clearly proven, is enough to show an absolute want of authority in Lewis, to take charge of or administer the estate of Berton. His collection, by suit, of the amount, if any, due from the company upon the policy sued on, or any administration by him, in his capacity as public administrator, of Berton's estate, would be acts of palpable usurpation. The notice filed by him in the clerk's office of the probate court, was ineffective for any purpose, although it contained the false recital that Berton was "late of the county of St. Louis." Such a notice was required only when he took charge of an estate upon which he could legally administer. No judgment rendered in this action, upon the merits, could protect the company against a future suit by the proper representatives of Berton's estate. This would not be the case if Lewis' claim to administer that state had any sound foundation upon which to rest. It was not the purpose of the statute to authorize a suit by a public administrator in Missouri against a foreign corporation doing business there, upon a contract, not made or to be executed in that State, with a citizen of another State who neither resided, nor died, nor left any estate, in Missouri. Without discussing the validity of any local statute framed for such purposes as are imputed, by this action, to the Missouri statute of 1868, it is sufficient to say that the present case is not within that statute, according to any reasonable interpretation of its provisions.

It is claimed, however, that this view cannot be sustained without questioning the authority of the public administrator in a collateral proceeding. In support of that position, we are referred to Wetzell v. Waters, 18 Mo. 396; Riley v. McCord, 24 Mo., 267 Lancaster v. Washington Life Ins. Co., 62 Mo., 121 and Johnson v. Beazley, 65 Mo. 250. We have not access, at this time, to the volume of reports last cited, but upon examining the other cases we find nothing which, in any degree, militates against the views we have expressed. In the case in 18 Mo. a judgment by default had been taken, and the question was presented, upon appeal, whether it was incumbent upon the public administrator, in whose favor the judgment was rendered, to state in his pleadings, or to prove, as a condition precedent to recovery, the facts which authorized him to take upon himself the burden of administration. It was held that it was not, and that no one but an executor, or legally appointed administrator, could dispute his authority, except in cases in which the same thing might be done in relation to private administrations. In the case in 24 Mo., it was decided that illegality in the grant of the letters of administration could not be taken advantage of in a collateral proceeding, and that they must be regarded as valid until regularly revoked.

In the case of 62 Mo., the issue was as to the fact of the death of a citizen of Missouri, whose life had been insured, and upon whose estate administration had been granted by the Probate Court of St. Louis County, which was the county of his residence. The answer admitted the appointment of the administrator, but denied the fact of death, and upon that ground questioned the legality of such appointment. The court held that the admissions in the pleadings and the testimony of the defendant established the fact of letters of administration having been granted, and that such letters constituting *prima facie* evidence of the death of the person on whose estate they were issued, the burden of proof was upon the defendant to show that the assured was not dead, and consequently that administration had been illegally granted. These decisions, it is obvious, have no application to the subject under consideration. They announce no principles in conflict with those here declared. The company does not ask the revocation of Lewis' letters of administration. Its answer does not dispute the validity of his appointment as Public Administrator of St. Louis county. Recognizing his right to perform all the functions which, by the laws of Missouri, pertain to that

office, the company, in view of the facts we have stated, simply denies that Lewis had any authority, under the statutes of that State, or by virtue of his appointment as such administrator, to take charge of the particular estate in question, or assert any claim arising out of the alleged contract of insurance. If the mere assumption by Lewis of authority to that extent was sufficient *prima facie* to maintain this action—a proposition which it is unnecessary to discuss—the conceded and established facts show an entire absence of any such authority, and prove that the company was not bound to litigate with him in any court whatever its liability upon the policy sued on. The company only sought to restrict him to the discharge of his legitimate duties, and prevent him from intermeddling in matters which did not concern him as public administrator.

But it is further contended that the answer, which relied upon these objections to the action, was in the nature of a plea in abatement, and that such objections were, according to established rules of practice in the Federal courts, waived when the company answered to the merits without first having the court dispose of the issue as to Lewis' right to maintain the action. This position is, however, wholly untenable. The defense, so far as it impeached the authority of Lewis, by virtue of his appointment as public administrator, to collect the amount, if any, due on the policy, was in bar, not in abatement, of the action. The defense, if true, did not question his capacity as such administrator to perform any of the duties imposed upon him by law. It only insisted that he, as such lawfully appointed administrator, had *no cause of action* against the company upon the alleged contract of insurance.

What we have said is decisive of the case, and we are consequently relieved from the necessity of inquiring whether the policy sued on was ever delivered to, or accepted by, Berton, so as to be binding on the insurance company. That question can only arise in an action against the company by one who is entitled by law to represent his estate.

The judgment is reversed, with directions to dismiss the action without prejuice to any suit upon the policy by the proper parties in the proper forum.

SALVAGE— ALLOWANCE — LOSS BY DEPRECIATION IN VALUE.

THE CARL SCHURZ.

United States District Court, Western District of Tennessee, November Term, 1878.

Before Hon. E. S. HAMMOND, District Judge.

1. SALVAGE—ALLOWANCE.—The court will not allow the whole net proceeds in the registry, as compensentation to the salvor, even when his actual expenditures exceed the amount of the fund, except in cases where the owner abandons the property and neglects to reclaim it by appearance in the suit.

2. CASE IN JUDGMENT.—Where the proof showed that a sunken vessel after being raised was worth $1,700, but being sold *pendente lite* she brought only $792, and that the libelant actually expended $568.95, under circumstances which would ordinarily have justified an allowance of one-half of the property, the court allowed only one-half the net proceeds in the registry.

3. LOSS BY DEPRECIATION IN VALUE. — A salvor must bear his loss by depreciation in value. He is *sub modo* a joint owner, and in the absence of an express contract he can not recover on any theory of a debt due by either the owner or the property, with a lien to be satisfied, at all hazards, to the full extent of the proceeds in the registry.

In Admiralty.

HAMMOND, J.:

The question reserved at the hearing grows out of the following state of facts: The libelant raised the sunken vessel, at an actual expenditure, as he testifies, of $568.95, for labor of hands employed by the day, hire of flats, cribs, jacks and other tools employed in the work, and the compensation of a diver and his assistants. The vessel was not derelict, her owner and captain remaining, all the time during the work, on the boat. I think there is no doubt that the preponderance of the proof shows that too much time was expended by the libelant in the work, and that it could and should have been accomplished at a much less cost than the libelant incurred; but it is difficult to say, from the proof, at how much less it could have been done. The estimates made by the witnesses, under the circumstances they detail, are entirely unsatisfactory. It was mere guessing on their part. The proof establishes the fact that the boat, which was a very small steamboat, converted from a barge, was worth, at the time of the disaster, not more than $2,000, and that the repairs put on her after she was raised, cost from $200 to $300; that is, the repairs necessary to cure the damage done by the sinking and raising, and not taking notice of the repairs which were in the nature of betterments. This would make her value in the hands of the salvor, after she was raised, not less than $1,700. When we consider the danger of a total loss from the perilous position in which the vessel was placed by the disaster, the difficulties in the use of crude appliances for performing the service, which seem to have been the best that were available, the cold weather and running ice during part of the time, and the actual expenditure of money, as above stated, which is found by aggregating from the libelant's account as he proves it, the sums paid out by him, and leaving out of view the other charges made for his own services, and hire of his own tools, I think one-half of the value of the boat, which was comparatively of small value at best, not too much to be allowed as compensation to the libellant. This would be very nearly the exact amount he claims by the account, which he tenders as a statement of the expenditures he made and the value of his services as estimated by himself, for the purpose of aiding the court in fixing the allowance of salvage, if we include the charges for his own services, and the use of his own tools, and are to make the allowance on the basis of value as shown by the proof in the case, say on a value of $1,700.

But the libelant having seized the vessel by pro-

cess in this case, on his application she was sold some ten or fifteen days afterwards, *pendente lite*, while almost imbedded in the ice, at an unfavorable time and under unfavorable circumstances, so that she only brought $792, which is the sum in the registry to answer costs, and for distribution between the salvor and the owners. It is not certain that if the property had been kept in the control of the marshal until more favorable weather for a sale, it would have brought any more. So far as the proof is concerned, it is all speculation; but I think it is fairly inferable, from the circumstances as shown by the proof, that owing to the inauspicious conditions, the vessel has been sold for much less than otherwise she would have brought. The libelant claims that his compensation should be fixed on the value as shown by the proof, and not the sale, or else that the proportion should be so increased as to give him a larger amount than one-half the net proceds in the registry, and that, under no circumstances, should he be allowed less than his actual expenditures of money. This would exhaust the whole fund, leave nothing for the owners, and throw all the loss of the unfortunate sale on them. I do not think the element of time, between the raising and selling of the vessel, is at all material here. It is not probable that she would have sold for any more on the day she was raised, than she did fifteen days subsequently; and, therefore, it is merely another mode of claiming on the actual value as shown by the proof, to argue that a salvor is entitled to recover on the value at the time of the service, and not on any subsequent value. For all practical purposes, the date of the service and date of the sale are the same in this case.

The question remains whether the court can look beyond the fund in its hands in estimating the value of the property. If the depreciation grows out of the misconduct of the party in possession, whether it be the owner or the salvor, I have no doubt that misconduct may enter as an element into the judgment of the court in making the allowance; but there is no misconduct here, unless it may be that the action of the libelant in pressing a sale at an unfavorable time may be so considered. There is nothing in the proof to show whether this was bad conduct or not, for it may be the expense of keeping the property, or the danger of losing it by delay, made a speedy sale a necessity. Let this be as it may, I shall treat the case as one without fault on either side in respect of the sale, b cause the proof does not show otherwise.

Neither do I think it just to treat the disastrous sale as the result of the failure of the owners to bond the property, as it is called. There is nothing to show that they could have given a stipulation for her value; and if there were, it is not a right the libelant has to a bond; but it is entirely optional with the owners whether they give bond, or leave the property with the court. In cases where the owner abandons his property to the salvors, makes no claim, or is unreasonably long in asserting his rights, the court may undoubtedly decree the whole to the libelant. The Zealand, 1 Low. 1; Two Anchors and Chains, 1 Ben. 80.

It is very earnestly insisted that the element of "reward," and not entirely that of compensation, is the rule for allowance of salvage. In meritorious cases on the high seas, and perhaps there may be cases on the rivers, this element is often controlling. Here we have a case of a steamboat, snagged at her landing in this port, impaled upon a sunken wreck at the shore, and tied by her cable near her usual landing place. The salvor goes to her relief at the request of the captain, and after much hard work and unnecessary delay he succeeds in getting her afloat, and pumping her out. It does not seem to me that it is a case calling for anything in the way of rewards as understood in the admiralty courts; but if it were, it would be going to an unreasonable length to reward a salvor, however meritorious, with *the whole* of the property. As was said by the learned judge in The Waterloo, 1 Blatch & How. 114, 127, this would be a return to the barbarous practice of giving the finder all he finds. I do not find any case where the court allows all the property to go to the salvor, unless the owner is either unknown, or has voluntarily abandoned the claim he has to the property saved. A salvor, in the view of the maratime law, has an interest in the property; it is called a lien, but it never goes, in the absence of a contract expressly made, upon the idea of a *debt* due by the owner to the salvor for services rendered, as at common law, but upon the principle that the service creates a property in the thing saved. He is to all intents and purposes a joint owner, and if the property is lost, he must bear his share like other joint owners.

This is the governing principle here. The libelant and the owners must mutually bear their respective shares of the loss in value by the sale. If the libelant has been unfortunate, and has spent his time and money in saving a property not worth the expenditure he has made, or if, having saved enough to compensate him, it is lost by the uncertainties of a judicial sale, for partition, so to speak, it is a misfortune not uncommon to all who seek gain by adventurous speculations in values. The libelant says, in his testimony, that he relied entirely on his right as a salvor. This being so, he knew the risk he ran, and it was his own folly to expend more money in the service than his reasonable share would have been worth, under all circumstances and contingencies. He cannot rely either on the common law idea of an implied contract to pay for work on and about one's property what the work is reasonably worth, with a lien attached by possession for satisfaction, nor upon any notion of an *implied maratime contract* for the service with a maritime lien to secure it, as in the case of repairs, or supplies, furnished a needy vessel, or the like. In such a case, the owner would lose all, if the property did not satisfy *the debt* when fairly sold. But this doctrine has no place in the maritime law of salvage. It does not proceed upon any theory of an implied obligation, either of the owner or the *res*, to pay a *quantum meruit*, nor actual expenses incurred, but rather on that of a reasonable compensation or reward, as the case may be, to one who has rescued the *res*

from danger of total loss. If he gets the whole, the property had as well been lost entirely, so far as the owner is concerned. I think the public policy of encouragement for such service does not of itself furnish sufficient support for a rule which would exclude the owner from all benefit to be derived from the service. The property is saved for him, not for the public; and he cannot be said to have implicitly authorized his whole property to be exhausted in saving it; particularly when he has not abandoned it, and it is not derelict. The property and the owner would generally be at the mercy of the salvor, if such a doctrine should be established; and the temptation to so conduct the services as to absorb the whole property would be very great.

After the payment of costs, let the proceeds in the registry be equally divided between the libelant and the claimants.

I take pleasure in saying that Judge H. B. Brown, of the Eastern District of Michigan, now with me, concurs in this opinion.

RIGHT OF ASSIGNEE OF CHOSE IN ACTION TO SUE IN EQUITY.

WALKER v. BROOKS.

Supreme Judicial Court of Massachusetts.

[Filed October, 1878.]

HON. HORACE GRAY, Chief Justice.
" JAMES D. COLT,
" SETH AMES,
" MARCUS MORTON,
" WILLIAM C. ENDICOTT, } Associate Justices.
" AUGUSTUS L. SOULE,
" OTIS P. LORD,

A court of equity will not entertain a bill by the assignee of a strictly legal right, merely upon the ground that he can not bring an action in law in his own name, nor unless it appears that the assignor prohibits and prevents such an action to be brought in his name, or that an action so brought would not afford the assignee an adequate remedy.

GRAY, C. J., delivered the opinion of the court:

This bill was filed May, 1877, by Joseph Walker and Geo. W. Walker, co-partners, against James W. Brooks and Horace N. Bigelow. The material allegations of the bill are as follows:

1. That the defendant, Bigelow, executed to the two plaintiffs a lease of and license to use a certain patented machine for compressing heels for boots and shoes, for which the plaintiffs were to pay him a royalty of ten cents; or in case of their rendering true accounts to him monthly the sum of one-half cent for each pair of heels thereby compressed. A copy of this lease is annexed to the bill. 2. That, at the same date, Bigelow entered into an agreement with Joseph H. Walker, one of the plaintiffs, to pay him for certain services in introducing the machine to the public (which the bill alleges have been performed) sums equal to those to be paid by the plaintiffs to Bigelow, under the lease and license from him. A copy of this agreement also is annexed to the bill. 3. That Bigelow has assigned each of these contracts to the other defendant, Brooks, who has become, in equity, entitled to all the advantages thereof, and to receive all sums of money due, or to become due from the plaintiffs under the same, and has become, in equity, bound to perform all the obligations, expressed or implied, therein to be performed by Bigelow. 4. That all the rights and obligations of Joseph H. Walker, under his agreement with Bigelow, have been assigned to, and vested in the two plaintiffs, and they are, in equity, entitled to receive all sums which are or may become due under the same. 5. That the plaintiffs, under the lease and license to them, have used the patented machine, and have duly kept and rendered accounts to the defendants, and have paid to them in full for such lease and use, to February 1, 1877, the sum of $3,000; and now owe and are ready to pay to the defendant, Brooks, a further sum for such use since that time. 6. That there is due a like sum from Brooks to the plaintiffs, and that they have demanded of him that he should pay to them the sum so paid by them, and should set off the sum so due from them as rent as aforesaid against the sum so in equity due to them from him, and that he has wholly refused to do so, and threatens to sue them for this sum.

The prayer of the bill is for a discovery under oath; for an account of all sums due from the plaintiffs to the defendants, or either of them, and from the defendants, or either of them, to the plaintiffs; for a set-off of such sums against each other; for an injunction against bringing any suit against the plaintiffs on account of any claim against them, as above stated, and for further relief.

To this bill the defendants have demurred, because the plaintiffs have a plain, adequate and complete remedy at law, and because they have not stated such a case as entitles them to any discovery or relief in equity.

We are of opinion that the demurrer is well taken, and that the bill can not be sustained upon any of the grounds assigned by the learned counsel for the plaintiffs.

It is attempted, in the first place, to bring the case within the rule that, where there are cross-demands between the parties of such a nature that, if both were recoverable at law, they would be the subject of a set-off, then, if either of them is a matter of equitable jurisdiction, the set-off may be enforced in equity. It is said that the defendants, as the assignees of the claim of Bigelow against the plaintiffs, had an equitable right of action against the plaintiffs, which, though at law it could only be sued in the name of Bigelow, might, in equity, be sued by both the defendants; and that such right of the defendants to sue the plaintiffs in equity, affords a foundation for jurisdiction in equity to order a set-off of that equitable right against the plaintiffs' claim. But a court of equity will not entertain a bill by the assignee of a strictly legal right, merely upon the ground that he can not bring an action at law in his own name; nor,

unless it appears that the assignor prohibits and prevents such an action to be brought in his name, or that an action so brought would not afford the assignee an adequate remedy.

In Hammond v. Messenger, 9 Sim. 327, 332, Vice Chancellor Shadwell so held, and said: "If this case were stripped of all special circumstances, it would be simply a bill filed by a plaintiff who had obtained from certain persons, to whom a debt was due, a right to sue in their names for the debt. It is quite new to me that, in such a simple case as that, this court allows, in the first instance, a bill to be filed against the debtor by the person who has become the assignee of the debt. I admit that if special circumstances are stated, and it is represented that, notwithstanding the right which the party has obtained to sue in the name of the creditor, the creditor will interfere and prevent the exercise of that right, this court will interpose for the purpose of preventing that species of wrong being done; and, if the creditor will not allow the matter to be tried at law in his name, this court has a jurisdiction, in the first instance, to compel the debtor to pay the debt to the plaintiff; especially in a case where the act done by the creditor is done in collusion with the debtor. If bills of this kind were allowable, it is obvious that they would be pretty frequent; but I never remember any instance of such a bill as this being filed, unaccompanied by special circumstances."

It is true that Mr. Justice Story in his Commentaries has observed upon that opinion: "This doctrine is apparently new, at least in the broad extent in which it is laid down, and does not seem to have been generally adopted in America. On the contrary, the more general principle established in this country seems to be, that wherever an assignee has an equitable right or interest in a debt, or other property (as the assignee of a debt certainly has), there a court of equity is the proper forum to enforce it; and he is not to be driven to any circuity by instituting a suit at law in the name of the person who is possessed of the legal title. A *cestui que trust* may ordinarily sue third persons in a court of equity upon his equitable title, without any reference to the existence of a legal title in his trustee, which may be enforced at law." Story Eq. Jur. § 1057 *a*. To the same effect is the statement in Story Eq. Pl. § 153.

But the adjudged cases, including those cited by the learned commentator, upon being examined, fail to support his position and show that the doctrine of Hammond v. Messenger is amply sustained by earlier authorities in England and in this country. A century and a half ago, parties for whose benefit their agent had obtained policies of insurance in his own name, brought bills in equity against the underwriters. But Lord Chancellor King refused to sustain them, saying, "At this rate all policies of insurance would be tried in this court; for they are generally taken in the name of a trustee." And again, "If I should give way to this attempt, no action would ever be brought on a policy." And his decision was affirmed in the House of Lords. Dhegetoft v. London Assurance Co., Mosely 83, and 4 Bro. P. C. (2d ed.) 436. Fall v. Chambers, Mosely 193. Lord Hardwicke afterwards expressed a like opinion. Motteux v. London Assurance Co., 1 Atk. 541, 547. In Cator v. Burke, 1 Bro. Ch. 380, Cator, with whom Hargrave had deposited, as security for a debt of his own to Cator, a bond made by Burke to Hargrave, filed a bill of equity against Burke and Hargrave, to compel Burke to pay the debt to the plaintiff, out of a counter-bond for a larger amount, which Hargrave had made to Burke, and to prevent Burke from setting up the counter-bond as a defense to any action at law which might be brought against him in the name of Hargrave. The bill was dismissed, Lord Loughborough saying: "The bond can never be considered in any other light than as an unassignable security: to consider it otherwise would bring all the causes on bonds in Westminster Hall into this court. The plaintiff has mistaken both the law and the equity; for, first, he has supposed that the holder of a bond might, where there was no discovery to be made, come hither and have a different relief from what he could have at law; and secondly, that if there was fraud in giving the counter-bond, it could not be made use of at law. When the bill is dismissed with costs, you may bring your action in the name of Hargrave. If this bill would lie, by the simple act of assigning the bond a suit in equity might be brought on every bond that is given." So, in Rose v. Clark, 1 Y. & Col., Ch. 534, 548, Vice-Chancellor Knight Bruce said: "So, I apprehend, an equitable title to money secured by a bond is not of itself sufficient to entitle the party so interested to sue the obligor in equity for payment of the money. There must, I conceive, be something more."

The decision in Riddle v. Mandeville, 5 Cranch, 322, allowing an indorsee of a promissory note to sustain a bill in equity against a remote indorser, proceeded upon the ground that in Virginia no remedy at law could be had against him except by the circuitous course of successive actions by each indorsee against his immediate indorser, and that in that particular case the intermediate party was insolvent. See Mandeville v. Riddle, 1 Cranch, 290; Harris v. Johnson, 3 Cranch, 311. That Chief Justice Marshall, who delivered the opinions in these cases, did not consider them as satisfying the general proposition that the assignee of a *chose in action*, who could not sue thereon in his own name at law, might therefore do so in equity, is manifest from his opinion in the later case of Lenox v. Roberts, 2 Wheat. 373, in which the assignee of all the property of a bank was allowed to maintain a bill in equity in his own name upon a promissory note which had not been formally indorsed to him, for the reason that, "as the act of incorporation had expired, no action could be maintained at law by the bank itself."

In Carter v. United Insurance Co., 1 Johns., Ch. 463, Chancellor Kent dismissed a bill in equity against an insurance company, brought by the assignee of a policy of insurance, and briefly stated his reasons to be that the demand was properly cognizable at law, and there was no good reason for coming into the court of chancery to recover on the contract of insurance; that the plaintiffs

were entitled to make use of the name of the original assured in the suit at law, and the nominal plaintiffs would not be permitted to defeat or prejudice the right of action; that it might be said here, as was said by the Chancellor in the analagous case of Dhegetoft v. London Assurance Co., above referred to, that at this rate, all policies of insurance would be tried in this court; and that the bill stated no special ground for equitable relief.

It was held by the Court of Appeals of Maryland and Virginia and by the Supreme Court of Tennessee, in an opinion delivered by Judge Catron (afterwards a justice of the Supreme Court of the United States), that the mere fact of the assignment of a legal *chose in action* gave the assignee no right to invoke the jurisdiction of a court of equity. Adair v. Winchester, 7 Gill. & Johns. 114; Mosely v. Boush, 4 Rand. 392; Smiley v. Bell, Mart. & Yerg. 378. The opposing decision in Townsend v. Carpenter, 11 Ohio 21, is unsupported by any reference to authorities.

The cases before Chancellor Walworth of Fields v. Maghee, 5 Paige, 539, and Rogers v. Traders Ins. Co., 6 Paige, 583, contain no decision upon this point; and in the later case of Ontario Bank v. Mumford, 2 Barb., Ch. 596, 615, he said, "as a general rule, this court will not entertain a suit brought by the assignee of a debtor of a *chose in action* which is a mere legal demand, but will leave him to his remedy at law by a suit in the name of the assignor;" and referred to the cases before Chancellor Kent and Vice-Chancellor Shadwell, and in the courts of Maryland, Virginia and Tennessee, already cited.

By the law of this Commonwealth the assignee of a chose in action has adequate and complete remedy at law in the right to maintain an action thereon in the name of his assignor, or of his executor or administrator, without his assent, and even against his protest, at least upon giving him, if seasonably demanded, a bond of indemnity against costs. Rockwood v. Brown, 1 Gray, 261; Bates v. Kempton, 7 Gray, 302; Foss v. Lowell Savings Bank, 111 Mass. 285.

The statement in Story Eq. Jur., § 1436 *a*, that "if a legal debt is due to the plaintiff by the defendant, and the defendant is the assignee of a legal debt due to a third person from the plaintiff, which has been duly assigned to himself, a court of equity will set-off the one against the other, if both debts could properly be the subject of a set-off at law," is pervaded by the same error that we have considered.

The decision of the vice-chancellor in Williams v. Davies, 2 Sim. 461, by which a creditor appears to have been restrained in equity from taking judgment and execution at law on a debt of one to whom he owed a larger sum, is obscurely reported, and has been disapproved by Lord Chancellor Cottenham. Clark v. Cort, Cr. & Phil., 154, 159; Rawson v. Samuel, Cr. & Phil. 161, 178. In Clark v. Cort, the bill upon which the set-off was ordered was by the assignee of a claim which required the investigation of accounts, and the application of a security of which the court would have had jurisdiction if the suit had been by the assignor. And the chancellor said: "The case, then, is not that of a mere assignee of a legal debt, coming into equity to have the benefit of a set-off which he could not have at law." Cr. & Phil. 159. In Rawson v. Samuel he observed: "We speak familiarly of equitable set-off as distinguished from the set-off at law; but it will be found that this equitable set-off exists in cases where the party seeking the benefit of it can show some equitable ground for being protected against his adversary's demand. The mere existence of cross demands is not sufficient." Cr. & Phil. 178. And see Watson v. Mid. Wall. Railway, L. R. 2 C. P. 503; Spalding v. Backus, 122 Mass. 556.

In any action at law brought by Brooks in the name of Bigelow, to recover the sums due him from these two plaintiffs under the license, they could set-off the demand under the other contract assigned to them of Joseph H. Walker against Bigelow, if Bigelow had notice of such assignment before bringing his action. Gen. Stats. c. 120, § 5. Cook v. Mills, 5 Allen, 36, 38. Their neglect to give him such notice can not entitle them to demand the interposition of a court of equity. Wolcott v. Jones, 4 Allen, 367.

The bill shows no case for an account that can not be taken at law. Badger v. McNamara, 123 Mass. 117. It can not be maintained to restrain a forfeiture, because it does not show that any forfeiture is threatened, or that there is any danger of irreparable injury, therein differing from Florence Sewing Machine Co. v. Grover & Baker Sewing Machine Co., 110 Mass. 1. It can not be maintained, under Gen. Stats. c. 113, § 2, to reach and apply, in payment of a debt, property or rights of a debtor which can not be come at to be attached, or taken in execution in a suit at law against him, because it is not framed in that aspect, and because the statute relates to rights of property and to claims of the debtor against third persons, and does not extend to claims of the debtor against the plaintiff himself. Compton v. Anthony, 13 Allen, 33, 37. It can not be maintained for discovery, because it can not be maintained for relief, and does not show that any discovery is required in aid of proceedings at law. Pool v. Lloyd, 5 Met. 525; Ahrend v. Odiorne, 118 Mass. 261.

Demurrer sustained, and bill dismissed.

REMOVAL OF CAUSES.

EX PARTE GRIMBALL.

Supreme Court of Alabama, February, 1879.

HON. R. C. BRICKELL, Chief Justice.
" A. R. MANNING, } Associate Justices.
" GEO. W. STONE, }

1. CASE IN JUDGMENT.—One C was the trustee of certain property in Alabama left by will to testator's daughter. On the death of the latter, the trustee filed a bill in the State court against parties claiming the property, viz.: the brothers and sisters of the de-

ceased, her administrator in Alabama, and her husband, for the settlement of his trust and for instructions as to the disposition of the property. All the parties, except the husband, who resided in New York, were residents of Alabama. The husband filed a petition for the transfer of the cause to the Federal court. *Held* that he was not entitled to have the cause removed under any of the acts as to the removal of causes.

2. DUTY OF COURT TO EXAMINE CASE. — On the presentation of a petition for removal, it is the duty of the State court to examine it, and if necessary look into the case to which it relates, in order to ascertain whether it and the petitioner's relation to it are such as to entitle him to remove it.

Motion for prohibition to chancellor to restrain him from proceeding in the suit of Cruse, trustee, against Moore, Grimball, Rison, as administrator of Mrs. Grimball, and others, on the ground that Grimball, a non-resident, had petitioned for the removal of it under act of Congress, into the Circuit Court of the United States.

The property involved was Mrs. Grimball's portion of the estate of her father, Daniel Moore, who died many years ago, in Alabama. The trustee held, invested and managed it under provisions in the will, with authority to pay only the net income to testator's daughter, or to her husband if she should marry. She was married to petitioner, who resided in New York, and a few months afterwards died childless and intestate. The trust property is in Alabama, and is claimed by Mrs. Grimball's brothers and sister, under the will, and adversely to them by Rison, the administrator in Alabama of her estate, and by Grimball under the law of New York, the State of her domicil. Cruse filed his bill against them all, and some others, for a settlement of his trust, and instructions how to dispose of the trust estate. Grimball is the only non-resident. The chancellor overruled his petition.

MANNING, J., delivered the opinion of the court:

The acts of Congress for the removal of causes from the courts of the States to those of the United States, require on the part of the judges of either government, who may have to consider and act under them, candor and good temper. Jealousy of jurisdiction, when too susceptible of alarm and resentment, is apt to hurry those under its influence into error. The institutions of both governments are established for the good of all; and it is the right of all to have them preserved and upheld in the performance of their respective proper functions. When, therefore, cases arise in which the question to be decided is, whether the cognizance of them belongs to the State courts or the Federal courts, it is the dictate of patriotism, as well as of law, that jurisdiction shall be cheerfully declined by those to which it does not pertain, and exercised without offensive arbitrariness by those entitled to exercise it. According to the Supreme Court of the United States, through the late Chief Justice Cha e, "it may be not unreasonably said, that the preservation of the States and the maintenance of their governments are as much within the design and care of the Constitution, as the preservation of the Union and the maintenance of the national government." Texas v. White, 7 Wall. 700. To the high tribunal which takes this enlarged view of our complex political system, it belongs ultimately to determine the meaning and proper operation of the statutes under consideration; and its interpretations will probably be as satisfactory as they will certainly be binding on all judges.

The present case does not come under that portion of section 12 of the judiciary act of 1789 which relates to the removal of causes, or under the act of 1867 on the same subject. It is settled that a suit that may be removed under either of these, must be one in which all the parties on one side of it must be residents, and all those on the other side non-residents of the State in which the suit is brought. That is not the situation of the parties in this cause.

The only other two statutes on the subject are those of July 27th, 1866, and March 3d, 1875. It is contended that the former act is repealed by the latter. But a contrary conclusion was expressed on the circuit in the summer of 1877, by Justices Bradley and Miller, of the Supreme Court of the United States—by the former in the case of Girardey v. Moore, in Georgia, 5 Cent. L. J. 78, wherein he resorted to the act of 1866 for the authority to remove the cause, and by the latter, in Board of County Commr's v. Kansas Pacific Ry. Co. in Colorado, 5 Cent. L. J. 102. And we shall consider the concurrent opinions of these distinguished judges as establishing that the act of 1866 was not repealed.

According to this act, when a suit is brought by a citizen of one State in a court of that State "against a citizen of the same and a citizen of another State," the suit may be removed by the latter, "if, so far as it relates to him it is brought for the *purpose of restraining or enjoining him*, or is a suit in which there can be a final determination of the controversy, so far as concerns him, *without the presence of other defendants as parties to the cause*." Rev. Stat. U. S., § 639. In Girardey v. Moore, the suit was brought to restrain Moore, a mortgagee, who resided in another State, from foreclosing his mortgage of the property involved; and in the opinion of the presiding justice, his co-defendants were not necessary parties, so far as the controversy with him was concerned. Wherefore the cause was retained in the Federal court, under the authority of the act of 1866. But in the present suit there was no purpose to restrain or enjoin Grimball, the non-resident party. And it is obvious from the bill, and results from his own averments in his petition, that the controversy he claims the right to wage is a controversy against some of his defendants, and not against the plaintiff. The act of 1866 may, therefore, be dismissed from further consideration.

The act of 1875, in section 2, provides that when, in the suit to be removed, "there shall be a controversy which is *wholly between citizens of different States*, and which can be fully determined as *between them*, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit into the Circuit

Court of the United States for the proper district." Acts of 1874-'75, 471, § 2.

In reference to the first section of this act, defining the cases of which "the Circuit Court of the United States shall have original cognizance concurrent with the courts of the several States," Justice Bradley's decision, expressed in the case above mentioned is, that "the jurisdiction given to the circuit court is as broad as the judicial power" vested by the Constitution in the general government; and to that he gives the largest extent ever conceded to it by any other judge, and a larger one than some others consider consistent with the Constitution. But in regard to the second section of the act of 1875, the same learned justice ruled that if, in a suit brought in a State court, there be a controversy between citizens of different States, but "some of the plaintiffs and defendants are citizens of the same State," the removal must be sought by all the defendants; and that it is only when "all the plaintiffs on one hand, and all the defendants on the other are citizens of different States," that any one or more of either, less than all, can effect the removal. Only in the latter case would there be, in the language above quoted from the second section, "a controversy which is wholly between citizens of different States, and which can be fully determined between them." "But in either case," says Justice Bradley, "it is the suit that is removed, and not a part of the suit."

With this the opinion of Justice Miller, in Board of Commr's v. Kansas Pacific R. Co., *supra*, appears to agree. And he refused to remand that cause for the reason that, in his opinion, the real controversy, when unnecessary parties to the suit were set aside, was wholly between persons who resided in different States, and the real litigation was between them, notwithstanding the plaintiffs were compelled to place the corporation in whose favor the bill prayed for relief, and of which they were only stockholders, in the position of a defendant in the suit, because, as was alleged, the faithless and fraudulent directors who had charge of it would not allow it to appear as plaintiff.

We have referred to these cases especially, because they go further than any others we have seen, in asserting and exercising authority to remove causes that are pending in State courts into the courts of the United States. Do the rulings and reasonings in them embrace a case like the present? Let us examine it only so far as to understand the object of the suit and the relations of the parties.

Cruse, the complainant, had been appointed trustee in 1874 (after the death of a former trustee) of the property involved. It consisted of realty and personalty, valued in Grimball's petition at about $100,000. The trust was created by the will of Moore, the testator, and covered the respective shares of all his daughters in his estate. But Cruse was trustee of his daughter Catherine's portion only. In that capacity he was required to keep the possession, care and management of the trust estate under his own control, and to pay over only the net income thereof to her, or, if he thought it prudent so to do, to her husband, if she should marry. (See the will, of which there is an exhibit to the bill of complaint.) She married Mr. Grimball in November, 1876, and died childless and intestate in July, 1877. Whereupon conflicting claims are set up to the trust funds and property, viz., on behalf of Mrs. Grimball's, brothers and sisters, as entitled to it by the provisions of the will, by Rison as administrator for the payment of debts and distribution, and by petitioner, Grimball.

Great responsibility was imposed on Cruse as trustee. And it is not lessened by the demand that he shall account to so many claimants. He is by no means a mere stakeholder, as the petition styles him. On the contrary, he has a profound interest in the cause. He must account therein for the trust estate and the management and proceeds of it, since it came to his hands. He must show that he has not, by lack of diligence, failed to obtain all the property and effects belonging to that estate, and this has induced him to make the executrix of his predecessor also a defendant. And the decree is to be rendered against himself, the trustee and plaintiff. In courts of equity, persons in the situation of this trustee and liable to be sued as defendants, may initiate, as plaintiffs, the proceedings for settlements to eventuate in decrees against themselves, which when satisfied, will exonerate them. But the plaintiff in such a case will be held to a responsibility no less strict than if he were pursued as a defendant. It behooves him, therefore, to see to it that all persons to whom he may be answerable for the manner in which he has executed his trust, be made parties to the cause in which he accounts, so that when the judgment of the court shall be satisfied, he will be forever discharged. And, of course, for the same reason, it is important to him, that the court rendering the decree shall have jurisdiction. Where then must this suit be prosecuted? All the parties "actually interested," or claiming to be so, are citizens of Alabama, and reside in Madison County, except Mr. Grimball. He lives in New York. And if he be successful in his contention that the gift to his wife was not of a mere life estate, but of the realty in fee simple, and of the entire property in the personalty still the personalty cannot in any event be delivered by the trustee to him. Before him comes the administrator, who also is a citizen of and under our statutes must reside in Alabama. Mr. Grimball can be entitled to make claim no otherwise than as a distributee. And though he be, as we understand him to claim that he is, the sole distributee of his wife's personal property, yet he can derive that here in question, or such as shall remain after administration, only through the administrator. To him the law commits it, and confers on him the entire transmissible ownership legal and equitable that was in Mrs Grimball when she died, for the purpose of enabling him to get in all the assets, discharge all legal and equitable claims against the same and make distribution of the residue. Therefore also no receipt or voucher that Grimball could execute to Cruse, for property or money, would avail against the claims of Rison the administrator. Indeed, Mr. Grimball was not a necessary party to Cruse's suit at all.

The right of the administrator, being a continuation in him of that of Mrs. Grimball, rests upon the same foundation as that upon which Mr. Grimball's claims are based, to wit, that there was in his wife a transmissible ownership. The maintenance of this is essential to the administrator's title; and being next in succession to Mrs. Grimball, his intestate, he is an indispensable party to the controversy. He may however be responsible hereafter to creditors and distributees, if he fail to possess himself of all the assets of her estate; but they have no present right thereto.

In our opinion, the persons who are the most important parties on both sides of the controversy in this cause, if not the only necessary parties, are those who reside in this State. None of them join Mr. Grimball in his petition for a removal of the suit. There is not in it "a controversy which is wholly between citizens of different States and which can be fully determined between them," and it is not, therefore, such a suit as under the act of 1875 can be removed upon the petition of one of the several defendants.

But it was further contended in this cause that, upon the filing of a petition for removal and offering a bond for costs as prescribed in the statute, by a person sued in a State court, the jurisdiction of the court ceases, and it must "proceed no further in such suit;" and that it may not look into the records and papers to ascertain for itself whether or not the cause is of that class or nature which the statute authorizes to be transferred to the proper Federal court.

We are not unmindful of the evils that may ensue from the exercise of a clashing jurisdiction by State courts and courts of the United States, over the same parties and causes. It is the duty of those tribunals to do all they properly can to prevent such consequences. But that a State court shall be paralyzed into impotency by the mere presentation of the petition and bond of a party sued therein, and be rendered incompetent to inform itself by looking into the record and papers on file, whether the suit belongs to a removable class, is, we think, an indefensible proposition. Why should a petition be presented at all, if no response is to be made to it and it may not be considered? According to the argument, it were fitter that the petition should be, in form as well as effect, a notice to the court that the person filing it demanded that it should no further interfere with him, but transfer the cause by which he had been brought there to another jurisdiction. Did the senators, representing the several States of the Union, vote the passage of an act intended to be so injurious to the authority and dignity of the tribunals by which the laws of those States are enforced, justice administered and peace and order maintained?

The acts of Congress particularly define the character of the suits which may be removed, and the relation thereto and toward the other parties, of the persons to whom the privilege of removal is conceded. And it is enacted that *if, in any such suit*, a party "*entitled to remove*" it files his petition and bond, &c., the State court shall proceed no further. It is only when those conditions exist that the court is ousted by law of its jurisdiction. By yielding it in any other case, the court would not be obeying the law, but submitting to the demand of an individual. And whether it is doing the one or the other it cannot know, without so far looking into the case as to ascertain whether it be removable or not under the law. To do this, is a duty it owes to the State by which its powers were granted, and the obligation was imposed upon it to employ them in administering justice in all cases within its cognizance brought before it, except such as are prohibited to it by superior authority. And the importance of making such an examination is forcibly impressed by an accidental circumstance in the present case. By a mere oversight, the petition of Grimball, while purporting to set forth the names of all the parties to the suit of Cruse (a statement needful to the end in view), omits any mention of Rison, the administrator; who, as we have seen, is an indispensable party to the cause more important, as such, than the petitioner himself, to a final determination of it. The omission was evidently a mistake; for Rison's name and office and position as defendant, are mentioned in the bond that was filed with the petition. But, how easy would it be, if the views of petitioner's counsel are correct, for one whom a little delay might enable to commit a great fraud (against which the statute provides for no security in the bond it prescribes), to avail himself, in order to do so, of this process of removal in almost any suit against him, by merely filing in court his unverified petition (no oath to it is required), and an inadequate bond. By the time the case should be remanded, the plaintiff may have lost all the means he had of obtaining satisfaction.

It is not necessary, however, to discuss this matter further. We understand our view to be the same as that of the Supreme Court of the United States. It is supported by the opinion of the Chief Justice in Railway Co. v. Ramsey, 22 Wal. 328, referred to in the able argument on this subject of ex-chancellor Cooper, of Tennessee, published in the *Southern Law Review*. And the recent case of Insurance Co. v. Pechner, 95 U. S. 183, is confirmatory of the like conclusion. In the latter case, a removal was prayed of a suit brought in a State court of New York, which court, regarding the petition as not showing a sufficient cause for the transfer, refused to allow it, and proceeded to trial and judgment. This was affirmed in the New York Court of Appeals; whence the cause was carried by writ of error to the Supreme Court at Washington, and that tribual, concurring in the opinion of the courts of New York, affirmed their judgment.

In these instances, it is true, the defect appeared on the face of the petition itself. But every such petition makes the case it relates to, by reference to it, a part of the petition; and cannot be properly and fully understood without some knowledge of the case. The decisions cited are, therefore, in our view, authorities in support of the proposition that the

State court must examine the petition, and, if necessary, look into the case to which it relates, in order to ascertain whether it and the petitioner's relation to it are such as that he is entitled to the removal he prays for. If he is, the court "has no discretion, and is compelled to permit the transfer to be made." Railway Co. v. Ramsey, *supra*.

We do not extend our opinion beyond the questions presented for our decision in the cause before us. The chancellor's ruling in it, we think, was correct; and the writ of prohibition applied for must be refused.

BRICKELL, C. J., not sitting.

DIGEST OF DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

October Term, 1878.

EQUITY—JURISDICTION AS TO WRITTEN INSTRUMENT — REFORMATION. — 1. Courts of equity have jurisdiction of controversies arising out of transactions evidenced by written instruments which are lost; or if the instrument is illegally framed or is vitiated by fraud, or if executed in ignorance or mistake of facts material to its operation, the error may be corrected or the transaction rescinded. Equities of this kind are incapable of enforcement at common law. Relief can only be granted in such cases in an equity court. 2. When an instrument is drawn and executed which professes or is intended to carry a prior agreement into execution, which by mistake violates or fails to fulfil the intention of the parties, equity, if the proof is clear, will reform the agreement and correct the mistakes. 3. Irregularity in proceedings may justify a reversal of a decree and the remanding of the case, but it will seldom or never present just cause for dismissing the bill.—*Ivison v. Hutton*. Appeal from the Supreme Court of the Territory of Wyoming. Opinion by Mr. Justice CLIFFORD. Decree reversed.

FALSE IMPRISONMENT—DAMAGES.—1. In an action against an officer for unlawful arrest and false imprisonment, *held*, that evidence was admissible in mitigation of exemplary damages, of facts tending to show that the plaintiff was guilty of the offense for which the arrest was made, although such facts were not a justification and the defendant was not aware of them when he made the arrest. 2. Where the injured party seeks to show a cause of great aggravation, cruelty and injustice, and upon that ground asks for exemplary damages by way of punishment, it is competent in reduction of such damages, and for the purpose of restricting the jury to compensatory damages, to give in evidence such facts and circumstances connected with the injury complained of as may show the truth of the whole case as it existed at the time of the alleged injury.—*Beckwith v. Bean*. In error to the Circuit Court of the United States for the District of Vermont. Opinion by Mr. Justice HARLAN. Judgment reversed. Reported in full, 19 Alb. L. J. 109.

OFFICIAL BONDS—SURETY—WHAT NOT SUFFICIENT TO DISCHARGE.— Suit against the surety upon the bond of a collector of customs, the condition of which is that he had truly executed and discharged, and should continue to execute and discharge all the duties of the office of collector according to law, and the breach assigned was that he had failed to account for and pay over the money received by him in his official capacity as collector. 1. Plea alleges laches on the part of the government in failing to assert its claim against other sureties on the bond, whereby, it is averred, the liability of the defendant's testator, if it ever existed, was discharged. *Held*, no defense. Laches of the officers or agents of the government is confessedly no bar to the assertion of its rights. 2. A plea charges that the duties, risks and responsibilities of the collector were raised, enlarged and changed during his official term, and consequently that the liability of the surety upon the bond, if it ever existed, was avoided and discharged. *Held*, that even if the addition of duties differed in their nature from those which belonged to the office when the official bond was given, that would not render void the bond as a security for the performance of the duties at first assumed, it would still remain a security for what it was originally given to secure. Converse v. United States, 21 How. 463, Broom v. United States, 15 Id. 143.—*Gaussen v. United States*. In error to the Circuit Court of the United States for the District of Louisiana. Opinion by Mr. Justice STRONG. Judgment affirmed.

ABSTRACT OF DECISIONS OF COURT OF APPEALS OF KENTUCKY.

January Term, 1879.

Hon. W. S. PRYOR, Chief Justice.
" T. H. HINES, } Associate Justices.
" M. H. COFER, }
" J. M. ELLIOTT, }

CORN STANDING ON THE WIFE'S LAND—EXEMPTION.—1. Corn standing on the wife's land, held as general estate, is subject to levy and sale under an execution against her husband. 2. Annual crops of grain planted or sowed to be in due season removed from the soil, are not considered as real property. Corn is treated as personalty by the statute prohibiting its sale until after the first of October, so as to give it time to mature. Affirmed. Opinion by ELLIOTT, J. —*Moreland v. Myall*.

SPECIFIC PERFORMANCE — RESCISSION.—1. G and L being joint owners of houses and lots agree upon a division thereof, conveyances to be made immediately so as to vest each with title to his part thereof. G conveyed his interest in L's part to him. L made a deed which G refused to accept, because L's wife refused to sign and acknowledge it, and thereafter L failed to make a deed to G. After two of the houses which L ought to have conveyed to G had been destroyed by fire, G commenced this suit, setting up the contract of division, and the failure of L to convey to him, etc., and prays for a rescission and a redivision. L filed his answer and cross-petition, tendering a deed duly signed and acknowledged by his wife two and a half years after the contract of division was made, and sought a specific execution of that contract. *Held*, that L was not entitled to a specific execution, but that G was entitled to a rescission and a redivision. 2. When there is a change of circumstances affecting both the character and justice of the contract which can not be compensated for in damages, resulting from the failure or refusal of one party to perform his part of the coutract, that party is not entitled to a specific execution, but the injured party is entitled to a rescission. Opinion by ELLIOTT, J.—*Gross v. Liebers*.

ASSIGNMENT OF DEBT—LIENS—RELEASE — PURCHASERS—CREDITORS.—1. The assignment of a debt carries with it a vendor's lien by which it is secured. When several obligations are secured by a common lien, the assignment of a portion of them operates to transfer the lien *pro tanto*. McClannshaw v. Chambers, 1 Mon. 45. 2. Lien retained in a deed to secure purchase-notes may be released by grantor, as to a

subsequent purchaser of the land for value and without notice of the assiggment, although such grantor had previonsly assigned a purchase-note secured by such lien to a third person. As between such subsequent purchaser of the land and the assignee of the note, one being bound to lose the amount of the note, the purchaser occupies the better position, and the assignee can not assert his lien as against him. 3. Purchasers are favored above creditors. The condition of the defendant is best. On these last propositions the court say: "Other things being equal, purchasers are favored, both at law and in equity, above creditors, and so also the condition of the defendant is best. The chancellor prefers to allow a loss to rest where he finds it rather than to transfer it to another equally entitled to his consideration—he prefers to allow rather than to inflict injustice, and to abstain from acting at all, when all he can do is to shift a loss from one innocent person to another." Reversed. Opinion by COFER, J.—*Summers v. Kilgus.*

SURETY—DELAY OF CREDITOR TO SUE—LIMITATIONS — OBSTRUCTING OR HINDERING SUIT—CONSTRUCTION WHEN SEVERAL THINGS ARE ENUMERATED.—1. If a surety verbally asks for time, and promises to pay the debt, and the payee, relying upon such promise, forbears to sue, this does not prevent the statute of limitations from running in favor of such surety. 2. Delay not assented to by the surety in writing does not prevent the statute of limitations from running in his favor. The provision that the statute of limitations shall not apply "to any delay assented to by the surety in writing," is equivalent to declaring that it shall apply to any delay not so assented to. Sec. 5, ch. 97, Rev. Stats., and Sec. 5, Art. 6, ch. 71, Gen. Stats. 3. An action is not "obstructed or hindered" within the meaning of the statute, by a verbal request to forbear, or by a verbal promise to pay the debt at a future date. 4. The words "or otherwise obstruct or hinder his being sued," as used in the statute (sec. 45, ch. 97, Rev. Stats., and sec. 5, art 76, ch. 71, Gen. Stat.), import such acts as would hinder and prevent the creditor from bringing suit, notwithstanding he desired to do so. 5. When certain things are enumerated and then a phrase or word is used which includes other things, but does not specify which other things were intended, such phrase or words will generally be confined to things of the same kind as those enumerated. 5 Term R. 375, 379; 1 B. & C. 237; 5 Id. 640; 3 Rand. 191. Walker v. Sayre, 5 Bush. 569, was decided correctly on the facts therein, but that part of the opinion in that case which purports to decide that a surety may obstruct or hinder his being sued, within the meaning of the statute, by a verbal request to forbear, and a verbal promise to pay, etc., was *dictum* and not well considered, Reversed. Opinion by COFER, J.—*Kennedy v. Foster.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF OHIO.

December Term, 1878.

[Filed February 4, 1879.]

Hon. WILLIAM WHITE, Chief Justice.
" W. J. GILMORE, } Associate Justices.
" GEO. W. MCILVAINE, }
" W. W. BOYNTON, }
" JOHN W. OKEY, }

BURGLARY—" FORCIBLE " BREAKING.— The force necessary to push open a closed but unfastened transom that swings horizontally on hinges over an outer door of a dwelling-house, is sufficient to constitute a breaking in burglary under the statute which requires a forcible breaking. Opinion by GILMORE, J.—*Timmons v. State.*

INSANITY—EVIDENCE.—On A's trial for a crime, he relied on insanity as a defense, and as evidence tending to prove the defense offered a record from the probate court showing that four years previous to the commission of the alleged crime, an inquest had been held in that court, and that he had been adjudged insane and confined in an asylum. *Held*, that the evidence was admissible. Judgment reversed and cause remanded for a new trial. Opinion by OKEY, J.—*Wheeler v. State.*

ACTION TO QUIET TITLE—ADVERSE CLAIM.—Under section 557 of the code (67 O. L. 116), a person in the possession of real property may maintain an action to quiet his title against a person who claims an estate or interest in the property adverse to the title of the party in possession. It is not necessary that the adverse claim should relate to or affect the right of present possession. Collins v. Collins, 19 Ohio St. 468, explained. Judgment reversed and cause remanded. Opinion by WHITE, C. J.—*Rhea v. Dick.*

SURETY—KNOWLEDGE OF PRINCIPAL OF AGENT'S CHARACTER—FRAUD.—If a principal, having knowledge or a belief founded on reasonable and reliable information, that his agent is a defaulter, require sureties for his fidelity in the future, and hold him out as a trustworthy person, whereby such security is obtained, he can not afterward avail himself of a guaranty so obtained from a person who was ignorant of what was known to, and ought to have been disclosed by the employer. Judgment affirmed. Opinion by MCILVAINE, J.—*Dinsmore v. Tidball.*

INTOXICATING LIQUORS—"CIVIL DAMAGE" LAWS —DAMAGES.—1. Where a variance between the allegations of the pleading and proof is not material within the meaning of section 131 of the code, the fact that the pleading was not amended to conform to the proof as provided for by section 132, will not constitute ground for the reversal of the judgment on error, 2. In an action brought under the seventh section of the act to provide against the evils resulting from the sale of intoxicating liquors, as amended April 18, 1870, it is not necessary that the liquor be sold in violation of the act of 1854. If sold in violation of any act prohibiting the sale, or furnished in violation of the act of 1860 (S. & S. 748), the action will lie. 3. The provision of said amended section which creates a liability on the part of the seller for an injury resulting from intoxication to which the liquor unlawfully sold or furnished by him contributes only in part, is not in conflict with the constitution. 4. In an action brought by a married woman under said amended section for an injury to her means of support in consequence of the intoxication of her husband, it is not error for the court to refuse to charge, that "if the jury award the plaintiff any amount by way of exemplary damages, they should not consider the fact, if such they find it to be, that certain of the illegal sales were made on Sunday." 5. Where it appears in such action that the damages awarded by the jury are excessive, the court on error, on a *remittitur* of such excess, may affirm the judgment. Unless a *remittitur* to the amount of the first verdict, as of the date of the second, be entered, a new trial will be ordered. If entered the judgment will be affirmed. [GILMORE, J., is of the opinion that the judgment should be reversed on the grounds that improper and prejudicial testimony was admitted, and that the charge of the court, as to the acts of 1831 and 1836, is erroneous.] Opinion by BOYNTON, J.—*Sibila v. Bohney.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF MISSOURI.

October Term, 1878.

[Filed December 2, 1878.]

HON. T. A. SHERWOOD, Chief Justice.
" WM. B. NAPTON,
" WARWICK HOUGH,
" E. H. NORTON,
" JOHN W. HENRY, } Judges.

EJECTMENT—POSSESSION UNDER MISTAKE OF TITLE, WITH CLAIM OF RIGHT, ADVERSE TO TRUE OWNER.—This was an action of ejectment. Plaintiff had title and defendant relied on the bar created by ten years adverse possession. Judgment for defendant, from which plaintiff appeals. It appeared that defendant, in 1864, bought and received a deed to a forty acre tract, which he supposed at the time was the tract in dispute, but which was in fact a different forty. That so believing he took possession of the forty in dispute, made improvements, and did not discover his mistake until 1873. He continued in possession however thereafter, the same as before. Shortly after discovering the mistake plaintiff offered to sell to defendant, who asked his price, stated he had no money, and refused to purchase. Suit was brought in 1875. Plaintiff asked the trial court to declare that, having taken possession under the circumstances stated, defendant's possession was not adverse and hostile, which the court refused. *Held*, 1. It is the settled doctrine of this court that if one by mistake enclose the land of another, and claim it as his own, his actual possession will work a disseizin; but if ignorant of the boundary line he makes a mistake in laying his fence, making no claim however to the land up to the fence but only to the true line as it may be subsequently ascertained, and it turns out that he has enclosed the lands of the adjoining proprietor, his possession of that land is not adverse. Knowlton v. Smith, 36 Mo. 507; Kincaid v. Downey, 47 Mo. 337; University v. McClure, 28 Mo. 483; Thomas v. Babbitt, 45 Mo. 384; Tamm v. Kellogg, 49 Mo. 122; Hamilton v. West, 63 Mo. 93. Here defendant by mistake took possession of the land belonging to plaintiff, but he claimed it as his own, and had no thought of yielding possession to the true owner, if it was not his own. Under such circumstances his possession in law and fact was adverse to the true owner, notwithstanding he may have been in error as to his own right and title. 2. A mere proposition to buy the land by a person in possession is not necessarily a recognition of the title of the person of whom he proposes to purchase. To prevent the operation of the statute a parol acknowledgment of the adverse possession by the person in possession must be such as to show that he intends to hold no longer under a claim of right; but declarations made merely with a view to compromise a dispute are not sufficient. Angell on Lim. 388. Affirmed. Opinion by HENRY, J.—*Walbrun v. Ballew.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF KANSAS.

January Term, 1879.

HON. ALBERT H. HORTON, Chief Justice.
" D. M. VALENTINE,
" D. J. BREWER, } Associate Justices.

FRAUDULENT CONTRACT—HOMESTEAD — RESCISSION OF CONTRACT.—1. The mere delay of the party who finds himself defrauded in rescinding a fraudulent contract and returning the property he has received under the contract, does not take away the right if, in the interval, whilst he is deliberating, no innocent third party has acquired any interest in the property, and the wrong-doer in consequence of the delay, is no way affected injuriously in his position. 2. Where there is a verbal contract for the sale of a homestead made by the husband and wife to another party with part performance and possession by the purchaser of the homestead, and upon investigation soon after it is discovered by the husband and wife that they have been greatly defrauded by the fraudulent representations of the purchaser and on account of such fraud have the right to avoid the contract: *Held*, as the homestead can not be alienated without the joint consent of both husband and wife, either or both have the right, upon the return of the property received under the contract, to rescind the contract, and any act of the husband in affirmance or recognition of such fraudulent contract, after the discovery of the fraud committed, without the consent or knowledge of the wife, is not binding on her. Opinion by HORTON, C. J. Affirmed. All the justices concurring.—*Wicks v. Smith.*

PARTITION—HOMESTEAD — VOID JUDGMENT.—1. Where a person owns an undivided half of three hundred and twenty acres of farming land and resides upon and occupies it with his family, consisting of his wife and children, and an action of partition is brought by the other tenants in common with him to divide the real estate and have certain claims of lien holders adjudged liens against the homestead interest of such person: *Held*, that the wife is a necessary party in action. 2, A judgment in such an action decreeing that the one hundred and sixty acres set off to the husband is subject to certain liens which, if not paid within a short time, shall be satisfied from the proceeds arising from a sale of said homestead, is void as against the wife in the absence of jurisdiction of her person by the court rendering the judgment. 3. A and others brought an action to partition three hundred and twenty acres held by tenants in common, and of which land B was the owner of an undivided half, subject to a lien under an execution issued and levied upon a judgment for the purchase-money of one sixteenth part thereof. The interest of B was occupied so as to create a homestead claim for himself and wife. In the action about one hundred and sixty acres were set off to B, subject to a lien for the said purchase-money. No service, either personal or constructive, was made upon the wife, and she made no appearance in the action, but an unauthorized attorney filed pleadings in the case in her name but without her knowledge or consent. *Held*, that in an action brought by her to modify said judgment and to readjust the lien of the judgment-creditor for the purchase-money, all the original parties in the partition suit are necessary parties for a full and complete determination of the matters involved. Opinion by HORTON, C. J. Reversed. All the justices concurring,—*Wheat v. Burgess.*

PARTNERSHIP—SUNDAY CONTRACT.— 1. L, W & B were partners dealing in cattle. L on behalf of the firm, sold some eighty head to F, who knew of the partnership, and had had dealings with it. B claimed to have purchased the cattle from his firm some months prior to the sale to F. *Held*, that there was no change in the possession or control of the cattle at the time of B's purchase, and if F without any knowledge of such prior purchase, or of any facts calculated to arouse suspicion and put him on inquiry, and finding the cattle in the possession of the firm, bought in good faith for a valuable consideration, and in the ordinary course of business, his title would be good against B. and that notwithstanding the latter's purchase was also in good faith and for a valuable con-

sideration. Such a case is determined by the laws of partnership rather than by the provisions of the statute of frauds. 2. Subsequent to the time of B's purchase, but prior to that of F's, L, on behalf of the firm, turned the cattle over to T, under a feeding contract, by the terms of which the latter was to take the cattle to a certain place and there feed them until the succeeding July, that then the cattle were to be sold, a certain sum to be paid the firm, and the balance, if any, divided between the firm and T, and that T was not to remove or dispose of the cattle without the consent of the firm. This contract was assigned by L for the firm to F at the time of his purchase. Subsequently, but before July, B took the cattle from T under a writ of replevin. Thereafter he settled with T, paying him his charges for feeding, and the latter sold his interest in the cattle. After this F brought this action against B to recover possession of the cattle. *Held*, that F could maintain the action and was entitled to the possession; and that any adverse rights of possession created by the feeding contract were destroyed by the transactions between B and T. 3. A contract to sell cattle is valid though made on Sunday. Opinion by BREWER, J. Affirmed. All the justices concurring. — *Birks v. French.*

PUBLIC HIGHWAY— DAMAGES—EVIDENCE.—1. A jury, in assessing damages sustained by a land-owner by reason of the establishment of a public road across his land, can not take into consideration for the purpose of reducing his damages, all conveniences and benefits accruing to him by reason of the location of the road, but only such conveniences and benefits as are direct and special as to him and his land, and such as are the direct, certain and proximate result of the establishment of the road. They can not take into consideration such conveniences and benefits as are received in common by the whole community. 2. Increased value of the land may often be taken into consideration in fixing the amount of damages sustained by the owner thereof in laying out and establishing roads. But this can be done only where such increased value arises from some direct, special and proximate cause, such as the draining of the land, or building bridges across streets running through the land, or making some other valuable improvement on or near the land, by means of which the owner will be enabled to enjoy his land with greater advantage. Increased value, founded merely upon increased facilities for travel and transportation by the public in general, is not the kind of increased value which may be taken into consideration for the purpose of reducing the damages to be awarded to the land-owner. 3. As a general rule, the opinion of a witness, as to the amount of damages which the land-owner sustains by reason of the establishment of a public road across his land, is not admissible as evidence. 4. A land-owner is not necessarily damaged to the full value of his land covered by a public road, even if he has not received nor will receive any benefit of any kind whatever from the establishment of the road; for the public, by laying out and establishing the road, does not become the owner of the land covered by the road, but only acquires an easement therein, and the land-owner, himself, still remains the owner of the fee and of everything connected with the land not necessarily for the public use. It is proper, however, in many cases, and perhaps indispensably necessary in some, to introduce evidence showing the value of the land, and as to such value competent witnesses may express their opinions. Opinion by VALENTINE, J. Reversed. All the justices concurring.—*Roberts v. Commrs. of Brown Co.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF INDIANA.

November Term, 1878.

HON. GEORGE V. HOWK, Chief Justice.
" WILLIAM NIBLACK, } Associate Justices.
" HORACE E. BIDDLE, }
" JAMES L. WORDEN, }
" SAMUEL PERKINS, }

SUNDAY CONTRACTS— SUBSCRIPTION TO CHURCH —RATIFICATION OF.—Suit by appellees against appellant on a written subscription to a church. The evidence showed that the contract was made on Sunday. BIDDLE, J.: "As a general rule void contracts can not be ratified, but there seems to be an exception in favor of contracts void for having been made on Sunday; these may be ratified upon a consideration that essentially makes a new contract. But while the contract remains unexecuted, when nothing has passed between the parties, and they remain as they were at the time the contract was made, a mere promise to execute it will have no validity. The evidence in this case shows that the parties remain as they were at the time the contract was made; an admission, therefore, as the direct promise of the appellant to pay the subscription has no validity. 13 Ind. 203; 25 Ind. 503; 36 Ind. 476; 57 Ind. 54. Judgment reversed."— *Catlett v. Trustees M. E. Church.*

NEGLIGENCE — OWNER OF PROPERTY — CONTRACTOR.—This was an action by the appellee, Barbara Curran, against the appellants, Ryan, Victor and Knowlton, to recover damages for injuries received from falling into an excavation left partially uncovered. Ryan answered, admitting his ownership of the lot upon which the building was being erected, and that the plaintiff had been injured as alleged in her complaint, but averring that the acts alleged to have been the cause of the injury were not his acts nor the acts of his servants or agents, but of the said Victor and Knowlton who were erecting said building under a special contract in writing. A demurrer to his answer was sustained. HOWK, C. J.: "It was alleged in Ryan's answer that the appellants, Victor and Knowlton, skillful, reliable and competent builders, had exclusive control of the entire building to its completion, under a special contract with Ryan. In such a case Victor and Knowlton could not be regarded in any proper sense as the agents or servants of Ryan, except as to the specific results which they undertook to produce; and the law is now well settled that the employer of a builder or contractor, in such a case, is not responsible to third persons for the negligence of the contractor, or his servant, in the execution of the work. The work contracted for was not a nuisance *per se*, and the doctrine is now firmly established that unless the work is in itself a nuisance, the owner of the real estate will not be liable for injuries which result from the negligence of the builders, or contractors, or their servants, in the excavation of the work. Citing 8 Gray, 147; 4 Allen, 138; 17 Mo. 121; 11 N. Y. 432; 57 Penn. 347; 2 Mich. 368; 25 Ill. 424. The general proposition to be deduced from these authorities is that one person is not liable for the acts or negligence of another, unless the relation of master and servant exists between them; and when an injury is done by a party exercising an independent employment, the person employing him is not liable. The court erred in sustaining the demurrer to Ryan's answer. In so far as this decision conflicts with the case of Silvers v. Nerdlinger, 30 Ind. 53, the latter case is overruled. Judgment reversed as to Ryan."—*Ryan v. Curran.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF WISCONSIN.

November Term, 1878.

HON. E. G. RYAN, Chief Justice.
" ORSAMUS COLE, }
" WM. P. LYON, } Associate Justices.
" DAVID TAYLOR, }
" HARLOW S. ORTON, }

JURISDICTION OF COUNTY COURT—ADMINISTRATION OF ESTATE.—1. The only jurisdiction which the county court has in respect to the administration of estates, is over the estates of dead persons. 2. Proceedings in administering, settling and assigning the estate of a person who, though represented to have deceased, was and still is alive, are absolutely void for all purposes; and an entry and continuous occupation for ten years under claim of title exclusive of any other right, founded upon the judgment of the county court in such a case would not bar an action to recover the land. 3. Where land was assigned by the final judgment of a county court in administration proceedings, to defendant's grantor, but he had entered into possession more than a year before any step was taken in administration, claiming by descent, and continued in possession for some years after judgment, such possession can not be considered adverse under sec. 6, ch. 138, Rev. Stats. 1858, not having been entered into under claim of title founded on the judgment. Opinion by ORTON, J.—*Melia v. Simmons.*

MORTGAGE OF CHATTELS MORTGAGOR REMAINING IN POSSESSION.—1. While it is the settled law of this State that an agreement in, or contemporaneous with, a chattel mortgage that the mortgagor may remain in possession, sell the goods, and apply a part of tho proceeds to his own use, renders the instrument void as against creditors (Blakeslee v. Rossman, 43 Wis. 116, 6 Cent. L. J. 288), yet the mere fact of leaving a stock of goods in the mortgagor's possession, with instructions to go on and sell as usual, and make remittances to the mortgagee, though proper evidence to go to the jury, in connection with other facts, upon the question of fraudulent intent, does not of itself amount to fraud. Cotton v. Marsh, 3 Wis. 221. 2. The mortgage in this case not being void on its face, and the court below having found as a fact that it was taken without any intent to hinder, delay or defraud creditors, this court affirms the judgment in the absence of any preponderance of evidence against such finding. [TAYLOR, J., dissents, holding that the evidence shows clearly an understanding between mortgagors and mortgagee when the mortgage was given, that the former were to retain possession, sell and appropriate a part of the proceeds to their own use.] Opinion by ORTON, J.—*Fiske v. Harshaw.*

BOOK NOTICES

[NEW BOOKS. Bliss on Code Pleading. F. H. Thomas & Co., St. Louis. Brown's Life of Rufus Choate. Little, Brown & Co., Boston. Cooley on Torts. Callaghan & Co., Chicago.]

A TREATISE ON THE LAW OF PROPERTY in Intellectual Productions in Great Britain and the United States, embracing Copyright in Works of Literature and Art, and Playright in Dramatic and Musical Compositions. By EATON S. DRONE. Boston: Little, Brown & Co. 1879.

Intellectual productions constitute a species of property valuable to the author, recognized as such by the common law, and sanctioned by statute. As early as the beginning of the seventeenth century, the English Parliament passed an act looking to the protection of the author. Statutes securing to authors exclusive property in their works for a limited time were passedin several of the States before the adoption of the Constitution, which gave to Congress, for the purpose of promoting the progress of science and the useful arts, the power to protect the author and inventor. The latest statute on the subject—that of July 8, 1870—is very full and comprehensive. But before the statute right is the common law right, which gives to the owner of an unpublished literary composition an absolute property therein, which is lost, however, by publication. The difference between these rights is thus stated by the author: "The former exists only in works which have been published within the meaning of the statute, and the latter only in works which have not been so published. In the former case, ownership is limited to a term of years; in the latter it is perpetual. The two rights do not co-exist in the same composition; when the statutory right begins, the common law right ends. Both may be defeated by publication. Thus, when a work is published in print, the owner's common law rights are lost; and unless the publication be in accordance with the requirements of the statute, the statutory right is not secured" (p. 100); thus by publication the common law right is not lost, but is taken away by the statute. This was established by the judgment of the House of Lords in 1774, previous to which the Court of Chancery had frequently recognized and protected common law copyright in printed books.

What amounts to a publication is a question which has been the subject of much discussion. At common law a work is published when it is made public "by any means, or in any manner of which it is capable of being communicated to the public" (p. 115). So it has been held that to publish a descriptive catalogue of etchings or drawings is a publication of them; printing in a magazine an engraving of a painting is a publication of the engraving, but not, rather singularly, of the painting. Neither is a private circulation of copies, as in Prince Albert v. Strange, 2 De G. & Sm. 652, where Queen Victoria and her husband had given to their intimate friends lithographic copies of drawings and etchings which they had made for their own amusement, this was held not to be a publication of them. By simply parting with the manuscript of his work an author does not lose his right. It was so decreed in the cases of Lord Clarendon's History, (Duke of Queensbury v. Shebbaire, 2 Eden, 329), and Chesterfield's Letters, (Thompson v. Stanhope, Amb. 737). In Southey v. Sherwood, 2 Merw. 435, Southey, by letting the manuscript of one of his poems remain twenty-three years in the hands of a bookseller, did not lose his rights. But this case was decided on another ground, and one, under the circumstances, not very creditable to the chancellor. Southey had written a poem in 1794, which was then placed in the bookseller's hands. The poem was "Wat Tyler," a production of his youth, of little merit, and containing opinions which, in his maturer years, he condemned. It remained unpublished and almost forgotten till 1817, when he became aware that the poem had been published by an unauthorized person, who had obtained the manuscript without his knowledge or consent. He applied to the Court of Chancery for an injunction, which was opposed on the ground that the poem was seditious and blasphemous, and that equity would not interfere in such a case. This view was adopted by Lord Eldon, who refused to grant the relief asked. The chancellor's regard for morals may have been great, and his motive doubtless excellent, but his remedy was clearly misapplied. Had the injunction been granted, the offensive poem would never have been printed; it was refused, and hundreds of copies of Wat

Tyler, at the price of one penny each, speedily flooded the country.

Publication, as understood in the statute on the subject of copyright, has a more restricted signification. "In the case of books, maps, charts, drawings, engravings, photographs, lithographs and chromos, the only kind of publication recognized by the statute is the circulation of copies. Hence a literary composition is not published within the meaning of the statute, when it is orally communicated to the public, nor a pictorial production, excepting, perhaps, a painting, when it is publicly exhibited" (p. 285). Under our statute, the public performance of a dramatic composition is not such a publication as will defeat a copyright afterwards obtained of it.

International copyright exists between Great Britain and many other countries, among others Prussia, France and Spain. The efforts of authors for many years have been tireless but ineffectual to procure a like treaty between England and America. Therefore, all foreign authors, except, perhaps, foreign dramatists whose position under the circumstances seems an anomaly, may be robbed by us with impunity, and the property of our own authors stolen without remedy. This condition of things has been for years, and still is, a national disgrace; and it would seem that we are not even to have the credit of initiating a change in this respect, as the report of the English copyright commission of last year recommended that the benefit of copyright laws should extend to subjects and aliens alike, and that the law of that country "should be based on correct principles, irrespectively of the opinions or the policy of other nations." How long it will be before the example set us by the action of that commission will be appreciated by our own law-makers, it is, perhaps, idle to inquire.

It can hardly be disputed that Mr. Drone's treatise is the most thorough exposition of the law of property in intellectual productions that has ever been published in this country. The judicial decisions on the subject treated are not as numerous as on other branches of the law, but the statutes are many and confusing, and the precedents themselves irreconcilable and often ambiguous. In this day of many books, the law of copyright becomes more important than ever before, and the value of the present treatise correspondingly greater. The volume contains over 800 pages, and includes the statutes of Great Britain and this country *in extenso*. The work is not a mere digest of cases, for on all disputed and unsettled questions the author advances his own opinions in exact and forcible language, and in a style at once easy and attractive. We regret that a weekly journal is neither able to furnish the space nor to allow the time for such an examination and review of the work as Mr. Drone's admirable treatise is justly entitled to.

NOTES.

THE SUPREME COURT OF THE UNITED STATES has adjourned until the third of March.——The proposal to abrogate the provision in the New York constitution disqualifying judges from holding office after the age of seventy is meeting with great favor, and is likely to be adopted.——Chief Justice Richards, of the Supreme Court of Canada, has resigned on account of ill-health. Mr. Justice Ritchie, formerly a *puisne* judge of that court has been elevated to the Chief Justiceship.——The examination by a congressional committee of the charges against Judge Blodgett, of Chicago, has been concluded, and the evidence publicly taken is far from sustaining the serious charges brought against him. He seems, however, to have possessed an unfortunate way of offending people, and making himself disagreeable to those practicing before him, so that when he was publicly charged with high crimes, he did not have even the united support of the bar of his own court. It was, therefore, not remarkable that when statements which seem to have had no grounds to support them, began to be whispered around, a good many of those who, under other circumstances, would have been ready to deny their truth, were rather glad to assist their spread. Certainly, there were some facts developed during the examination which have a very bad look—the relations between the judge and the officers of his court, for example. Yet even these are not irreconcilable with innocence and perfect integrity. Though the committee has not yet reported, the result is hardly uncertain. Altogether, the investigation suggests the truth of what Bacon wrote, three centuries ago: "Patience and gravity is an essential part of justice, and an over-speaking judge is no well-tuned cymbal."

AN interesting and important question, says the *Solicitors Journal*, was decided by Sir R. Phillimore on Wednesday on an application for the arrest of the United States war frigate, The Constitution, and her cargo, for a sum claimed for salvage service rendered on the occasion of her recent accident off the coast of Dorset. The general exemption of ships of war from local jurisdiction, founded not only upon any absolute right of extra territoriality, but upon principles of public comity and convenience, and arising from the presumed consent of nations, was very clearly laid down in the American case of The Exchange, 7 Cranch. 135, where Chief Justice Marshall, in delivering the judgment of the court, said: "It is impossible to conceive, said Vattel, that a prince who sends an ambassador, or any other minister, can have any intention of subjecting him to the authority of a foreign power. Equally impossible was it to conceive that a prince who stipulated an asylum for his ship of war in distress should mean to subject his navy to the jurisdiction of a foreign sovereign. And if this could not be presumed, the sovereign of the port must be considered as having conceded the privilege to the extent in which it must have been understood to be asked." The same view was afterwards taken in The Independencia, 7 Wheat. 283, and in the case of The Charkieh, 21 W. R. 437, L. R. 8 Q. B. 200, Mr. Justice Blackburn remarked that "there is authority for saying that courts of justice can not proceed against a sovereign or a State, and I think there is also authority for saying that they ought not to proceed against ships of war or national vessels; and it is clearly desirable that this rule should be established, otherwise wars might be brought on between two countries." But in a case relating to the same vessel, 22 W. R. 63, L. R. 4 Adm. 93, Sir R. Phillimore said that it was by no means clear that a ship of war to which salvage service have been rendered may not *jure gentium* be liable to be proceeded against in a court of admiralty for the remuneration due for such service. "It is very remarkable," he added, "that Lord Stowell declined to pronounce any opinion upon this point in the case of The Prins Frederik, 3 Dods. 451." In the case of The Constitution, Sir R. Phillimore seems to have discarded his former doubts, for he held that The Constitution being a war frigate of the United States navy, and having on board a cargo for national purposes, was not amenable to the civil jurisdiction of the country. Since this was written The Constitution has returned to this country, and claims for salvage have been again made, in the present instance within the jurisdiction of this Government.